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No. 89, Original

In the Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF CALIFORNIA EX REL.
STATE LANDS COMMISSION, PLAINTIFF

v.

UNITED STATES OF AMERICA

ON CROSS-MOTIONS FOR JUDGMENT

REPLY BRIEF FOR THE UNITED STATES

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We must candidly confess that we do not fully understand California's submission. It is not clear to us whether the State is claiming the parcel at issue because it was once wholly submerged, or submerged at high tide, or because it is now upland. Nor are we sure whether the claim is founded on the *Pollard* doctrine, as construed in *Corvallis*, or on the Submerged Lands Act. And, finally, we cannot be certain whether California advances distinct or identical arguments with respect to the former seabed and the former foreshore or tidelands. In the circumstances, we confine ourselves to identifying the most obvious flaws in the State's submission.

A. *The Former Submerged Lands*

1. The State persists in labelling "sovereign lands" areas of the former seabed of the Pacific Ocean, permanently submerged at statehood and for half a century thereafter. This assertion is apparently independent of the Submerged

Lands Act which, in California's view, merely "confirmed [an] already conferred title." Cal. Br. 10.

As we have already pointed out (U.S. Br. 8-9), this Court's decisions—including *United States* v. *California*, 332 U.S. 19 (1947)—stand firmly in the way of that submission. It is no good quibbling about the exact character of the *federal* interest in the seabed below the low-water line (Cal. Br. 15-16 & n.16, 28-29 & n.22). Whatever else was decided, the first *California* case and its progeny squarely held that the *Pollard* doctrine does *not* apply to the open seabed (*e.g.*, 332 U.S. at 31-39) and the State has *no* interest therein. See para. 1 of the Decrees entered in the first *California*, *Louisiana* and *Texas* cases, 332 U.S. 804, 805 (1947); 340 U.S. 899 (1950); 340 U.S. 900, 911 (1950). It follows that, so long as they underlay the Pacific Ocean seaward of the low water line, the lands in suit were not "sovereign lands" of California.

2. The only question is whether the Submerged Lands Act of 1953 conveyed title to these lands to California, although, by then, they were no longer submerged or tidelands. We have fully explained why that statute could not, and did not attempt to, "overrule" the Court's constitutional holding that the seabed off the open coast did not inure to the States at statehood (U.S. Br. 8-10), and, with one exception, did not convey land long since emerged from the sea (*id.* at 10-20). On these points, we have nothing to add. Indeed, California seems to agree that the Submerged Lands Act granted only an ambulatory title, shifting as the actual limit of the sea changes from time to time, regardless of cause. See Cal. Br. 16-17, 28-29, 31.

The State appears to base its Submerged Lands Act claim on the exceptional rule that confirms State title to former submerged lands which had lost that character only because they had been "filled in, made or reclaimed." 43 U.S.C. 1301(a)(3). See Cal. Br. 24-27. This is a novel argument, wholly inconsistent with the agreed facts. See U.S. Br. 13-15

& n.5. Obviously enough, the cited provision reaches only lands deliberately appropriated from the sea by the act of man, not natural accretion indirectly traceable to some artificial construction built for a wholly discrete purpose.

At all events, however, treating the formerly submerged acreage as "made land" does not aid California. Indeed, as we have noted (U.S. Br. 16-17 & n.6), Section 5(a) of the Submerged Lands Act, 43 U.S.C. 1313(a), expressly withholds from the grant to the States all "accretions" to lands reserved by the United States, as well as "all lands filled in, built up, or otherwise reclaimed by the United States for its own use." Although the terms are not identical, it is safe to assume the two provisions (43 U.S.C. 1301(a)(3) and 43 U.S.C. 1313(a)) embrace the same character of artificial extensions of the mainland. The apparent congressional objective was to assure each sovereign the continuing benefit of land fill and like work accomplished by each. Although we believe both provisions inapplicable in the present factual setting, it is clear they cancel each other when the United States is the upland owner and is responsible for causing the extension into the sea.

3. We conclude, as before (U.S. Br. 7, 15, 19-20), that California's claim to such part of the disputed parcel as was once submerged seabed has nothing whatever to do with *Bonelli, Hughes, Corvallis* or *Wilson*. No decision of this Court remotely condones California's attempt to encroach on the federal domain by labelling as "State sovereign lands" an area which the United States reserved to itself and never relinquished. It is simply frivolous to assert that any rule of State law can expand the Constitutional grant under the Equal Footing Doctrine or the Congressional grant effected by the Submerged Lands Act.[1] Of course, each

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[1]We have assumed that California law would deny to the upland proprietor the benefit of accretion resulting indirectly from artificial

State is free to regulate the disposition of its "sovereign lands" as it sees fit (Cal. Br. 11). But State sovereignty includes no power to appropriate lands appertaining to the United States which, as a matter of federal law, are retained by the Nation.

B. *The Former Tidelands*

While wholly ignoring the relevance of the first *California* case to former submerged lands, the State invokes that decision as recognizing its claim to offshore tidelands—the area between the high and low water lines. See Cal. Br. 16, 29-30. Because of that difference, it is open to California to assert that the presumably small strip of former tidelands forming part of the contested parcel—unlike the formerly submerged seabed—was, at one time, "sovereign State land." But, even if that is conceded, it does not follow that California's title survived the geographical change which converted that area into upland.

In the absence of any rebuttal, we need not here repeat our submission with respect to the present status of these former tidelands. See U.S. Br. 20-24. Instead, we take the occasion to join California in urging against any ruling that would produce "a Linzer torte scheme of ownership" along the coast (Cal. Br. 31). We have ourselves made the same point (U.S. Br. 24), and have suggested how that result can be avoided by treating both the former submerged lands and the former tidelands as accretions to the adjoining federal upland.

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causes. That is certainly the general State law rule. See *People* v. *Hecker*, 179 Cal. App. 2d 823, 837-842, 4 Cal. Rptr. 334, 343-346 (1960). But it is not clear that the California courts would seek to apply it where the United States—or even a grantee from the United States—is the upland proprietor. Indeed, the landmark decision, *Carpenter* v. *City of Santa Monica*, 63 Cal. App. 2d 772, 147 P.2d 964 (1944), expressly recognizes that *federal* law controls where title is in or derives from the United States. 63 Cal. App. 2d at 784, 147 P.2d at 970.

For the reasons stated here and in our opening brief, the Motion of the United States should be granted, the Motion of California denied, and judgment entered quieting the title of the United States to the lands described in the Complaint.

Respectfully submitted.

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